U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 565-5330
(202) 565-5325 (FAX)

Date: October 8, 1998
Case No. **98 INA 112**

In the Matter of:

LA MICHOACANA, *Employer,*

on behalf of

ALVARO ESCOBAR, *Alien.*

Appearance: A. G. Vega, Esq., of Houston, Texas, for Employer and Alien.

Before : Huddleston, Lawson, and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arose from a labor certification application that was filed on behalf of ALVARO ESCOBAR ("Alien") by LA MICHOACANA ("Employer") under § 212(a)(5) (A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a) (5)(A) ("the Act") and the regulations promulgated thereunder, 20 CFR Part 656.[1] After the Certifying Officer ("CO") of the U.S. Department of Labor ("DOL") at Dallas, Texas, denied the application, the Employer requested review pursuant to 20 CFR § 656.26.

Statutory Authority. Under § 212(a)(5) of the Act, an alien seeking to enter the United States to perform either skilled or unskilled labor may receive a visa, if the Secretary of Labor has decided and has certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor; and (2) the employment of

[1]The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c). Administrative notice is taken of the *Dictionary of Occupational Titles*, published by the Employment and Training Administration of the U. S. Department of Labor.

the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed at that time and place. Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. The requirements include the responsibility of an Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the State Employment Security Service ("SESA") and by other reasonable means to make a good faith test of U.S. worker availability.

STATEMENT OF THE CASE

On May 6, 1996, Employer applied for alien labor certification on behalf of the Alien for the position of "Head Baker Mexican bread/pastries" for its Business Activity, which was the operation of a Mexican Bakery. The Employer's description of the Job to Be Performed was as follows:

> Prepare a variety of Mexican sweet bread in bulk and decorate by hand. Will supervise two bakers.

AF 132 (Quoted verbatim.)[2] On the basis of the Employer's description, the job was classified as "Baker" under DOT Occupational Code No. 526.381-010.[3] Reporting that no U. S. workers applied for the job, the SESA indicated that it had advised the Employer that the recruiting advertisement was misleading. AF 98-115.

Notice of Findings. On July 31, 1997, the CO issued a Notice of Findings ("NOF") advising that certification would be denied, subject to Employer's Rebuttal. AF 94. (1) The CO found the application deficient in that the Employer failed to provide a listing of the available pastry items for sale in its Mexican bakery, the Employer failed to establish that it had a need for a full-time Mexican bread/pastry baker, and the Employer did not demonstrate that the position

---

[2]The wage offered was $300 per week for a forty hour week from 5:00 AM to 1:00 PM, with no overtime. There was no requirement as to Education, but two years of Experience in the Job Offered or two years and six months of experience in the Related Occupation of Baker--Mexican bread/pastries was required. A national of Guatemala, the Alien was born in Guatemala March 22, 1965. He attended elementary school from 1971 through 1980. From April 1980 to January 1993, Alien was Head Baker -- Mexican bread, pastries, for Mexican bakeries in Guatemala. From February 1993 to the date of application the Alien worked as Head Baker -- Mexican bread, pastries, for a Mexican bakery in Houston, Texas, called Panaderia y Tortilleria La Michoacana. AF 125, 126, 132.

[3] 526.381-010 **BAKER** (bakery products) Mixes and bakes ingredients according to recipes to produce breads, pastries, and other baked goods: Measures flour, sugar, shortening, and other ingredients to prepare batters, dough, fillings, and icings, using scale and graduated containers [DOUGH MIXER (bakery products) 520.685-234]. Dumps ingredients into mixing-machine bowl or steam kettle to mix or cook ingredients according to specifications. Rolls, cuts, and shapes dough to form sweet rolls, piecrust, tarts, cookies, and related products preparatory to baking. Places dough in pans, molds, or on sheets and bakes in oven or on grill. Observes color of products being baked and turns thermostat or other controls to adjust oven temperature. Applies glaze, icing, or other topping to baked goods, using spatula or brush. May specialize in baking one type of product, such as breads, rolls, pies, or cakes. May decorate cakes [CAKE DECORATOR (bakery products) 524.381-010]. May develop new recipes or cakes and icings. GOE: 06.02.15 STRENGTH: H GED: R3 M2 L2 SVP: 7 DLU: 80

was clearly open to any qualified U. S. worker.[4] (2) The CO then said that the Employer's advertisement and posted notice failed to set forth the same work experience hiring criteria that it originally stated in the application form.[5] By way of rebuttal, the CO said, "In order to document that the two years' experience baking Mexican bread/pastries is not unduly restrictive, the employer is required to provide a menu of pastry items which are available for purchase at the store. To document that a person holding a general knowledge of baking could not perform the duties of the job, the employer is also required to provide recipes for the items that the bakery sells." The CO then said, "The employer must also provide inventory records and sales receipts to document the amount of pastry items which have been purchased by customers for the past year. Moreover, the employer must provide pictures of the petitioning employer's establishment where the alien will work which show the type of oven or other baking chamber that will be used to bake the items identified at Item 13 of the ETA 750, Part A." AF 95-97. [6]

Rebuttal. On September 3, 1997, the Employer filed its rebuttal addressing the issues discussed in the NOF. AF 75-93. The rebuttal included a statement by Employer's attorney, and various exhibits supporting its proof of the existence of a current opening for permanent, full-time employment in the Job Offered. Counsel argued that the acknowledged defect in the recruiting advertisement and posting was *de minimis*, and that the Employer should not be required to readvertise the position. As exhibits the Employer filed a menu or list of the Mexican Bread /Pastries it offered for sale, together with recipes that listed the ingredients but did not state the steps followed in the baking process for each item listed. Employer also filed an income statement for the year ending 1996, and several photographs of the bakery working area, equipment, and fixtures.

Final Determination. The CO denied certification by the Final Determination issued September 30, 1997. AF 72-74. After considering the Employer's rebuttal evidence and the entire record the CO found the Employer failed to remedy the defects described in the NOF. After reciting the evidence that Employer had been directed to submit in rebuttal and listing the items received in response to those requests, the CO said Employer had failed to submit the records of its inventory and sales receipts necessary to document the purchases of pastry items by its customers during the previous year. Moreover, said the CO, Employer's lists of recipe ingredients did not comply with the NOF, since it failed to submit the instructions for preparing those ingredients in baking the menu items. As a result, the CO concluded that the Employer had failed to present proof sufficient to establish its need for a full-time baker with two years' experience.

Appeal. On October 27, 1997, the Employer moved for reconsideration and, in the

---

[4]The CO cited 20 CFR §§ 656.20(c)(8), 656.21(b)(2), 656.21(b)(2)(i), 656.21(b)(2)(iv), and 656.21(b)(5).

[5]The CO cited 20 CFR §§ 656.21(g), 656.21(g)(1)-(9).

[6] The CO explained that, if the Employer established its need for a worker in this position, it would be required to readvertise the job because of the defect in its initial recruitment advertisements.

alternative, administrative-judicial review. The Employer argued that the job offered was for a "Head Baker" and not just a "Baker," contending for this reason that the CO misclassified position under the DOT. It contended that either two years of experience as a Head Baker or two years and six months as a Baker were necessary to qualify, and that any mistake in complying with the NOF was attributable to confused directions resulting from that defect in the NOF. The Employer further contended that the recipes it supplied were appropriate, observing, "The Employer's industry (Mexican Bakery) considers the ingredients to be the 'recipes' because all the Head Bakers employed in the Mexical baker industry have memorized the instructions and operate from prior experience as to how to mix the ingredients and such recipes are unavailable per se." AF 04-06. As this difference in understanding did not become apparent to the Employer until it read the Final Determination, Employer contended that the new evidence that the Employer filed as part of its motion to reconsider should be considered. Addressing the instruction to file documentation to prove the volume of pastry items customers had bought in the previous year, the Employer contended that the total sales and supplies it purchased in the latter half of 1966 was an adequate response to the NOF. Because the CO failed to cite a specific regulation authorizing this requirement, the Employer contended that the NOF was ambiguous and unclear and that its evidence of the income, cost of sales, gross profit, and expenses for its bakery store were adequate to comply with the NOF. In addition, the Employer claimed, the CO should consider the invoices it now filed as evidence of the quantities of baked goods bought for resale by the bakery from the middle of September 1996 to the middle of December 1996. AF 06. The CO denied reconsideration
on November 4, 1997, citing **Harry Tancredi**, 88 INA 441 (Dec. 1, 1988)(*en banc*), and referred the matter as an appeal to the Board. Employer filed a brief in support of its appeal on Feb 12, 1989.

Discussion

It is well-established that an employer has the burden of proving that a *bona fide* job opportunity exists that is open to U. S. workers. **Amger Corp.**, 87 INA 545 (Oct. 15, 1987) (*en banc*), as cited in **State of California Dept. of Consumer Affairs**, 94 INA 396 (Jul. 18, 1995); **Atherton Development & Engineering Corp.**, 92 INA 422 (May 11, 1994).

(1) First, the Employer attacked the CO's classification of the position under the DOT on the sole basis that its job offer is for a Head Baker and not for a Baker. The DOT does not categorize the sublevels of status suggested by Employer's argument, however. 20 CFR 656.21(b)(2) (i) (B) provides that the job opportunity's requirements, unless adequately documented as arising from business necessity,

> Shall be those defined for the job in the *Dictionary of Occupational Titles (D.O.T.)* **including those for subclasses of jobs** ... .

(Emphasis added.) Consequently, the Employer failed to establish that the CO's application of the DOT was wrong.

(2) The CO listed the sections and subsections of the regulations that the Employer's application had violated, as *supra.* Then the CO discussed the omissions of the Employer's application that required correction in the rebuttal. It follows that the NOF was not mere boilerplate. **Sizzler Restaurants International**, 88 INA 123 (Jan. 9, 1989)(*en banc*). In this case, the issue is whether the Employer's efforts to comply with the NOF directions, as stated was reasonable.

Employer's argument that its evidence was adequate and persuasive was based on an asserted customary understanding of the term "recipe" in the Mexican bakery industry. As this assumption was totally unsupported in the record by any evidence other than the Employer's own self-serving declarations as to its existence, the Employer's arguments that were based on this premise merited little weight. Moreover, the Employer did not indicate that it was relying on such an industry custom when it omitted the baking directions from the recipes it filed. As the CO had indicated that the DOT was the criterion against which the position's qualifications were to be measured, it was reasonable to infer that in preparing the rebuttal the Employer would take note of the DOT description of the work of a Baker, whose job duties it described in great detail, *e.g.*,

> Mixes and bakes ingredients according to recipes to produce breads, pastries, and other baked goods: Measures flour, sugar, shortening, and other ingredients to prepare batters, dough, fillings, and icings, using scale and graduated containers ... . Dumps ingredients into mixing-machine bowl or steam kettle to mix or cook ingredients according to specifications. Rolls, cuts, and shapes dough to form sweet rolls, piecrust, tarts, cookies, and related products preparatory to baking. Places dough in pans, molds, or on sheets and bakes in oven or on grill. Observes color of products being baked and turns thermostat or other controls to adjust oven temperature. Applies glaze, icing, or other topping to baked goods, using spatula or brush.

Cf., supra, at footnote 3. The recipes Employer offered as its rebuttal furnished no hint that it wanted to hire a worker who had the skills to combine and bake the ingredients that it listed by performing the functions set out in the DOT. Since this description of the job duties was intended to apply to subclasses of this position under the regulations, it necessarily governed the position of Head Baker as well as any subordinate worker pursuing this occupation in the Employer's bakery.

It has not gone unnoticed by the Panel that the Employer made no effort to seek clarification of the defects it now asserts, and gave no indication of any such confusion until it moved for reconsideration after the CO filed the Final Determination relying on the Employer's rebuttal evidence. Compare **Copper Range Company**, 94 INA 316 (Jun. 27, 1995). For these reasons the Panel finds that the examination of the NOF and Employer's rebuttal indicates that NOF identified the facts necessary to sustain the Employer's burden of proof explicitly and painstakingly in plain language that was consistent with universal usage. Consequently, the brief's citation of **Peter Hsieh**, 88 INA 540 (Nov. 30, 1989), is inapt because Employer was given clear and adequate notice of the deficiencies in its application and a full opportunity to

rebut. **Downey Orthopedic Medical Group**, 87 INA 674 (Mar. 16, 1988)(*en banc*).[7]

The Employer offered a parallel argument concerning the financial data that the NOF directed it to file in the rebuttal, consisting of such inventory records and sales receipts as are necessary to prove the volume of pastry items that the Employer's customer had purchased during the previous year. Instead, the Employer filed an income statement for its operations during 1996 in rebuttal and later contended that this should have been sufficient to show why it needed a baker with two years of training to take charge of its bakery. First, the data filed with the motion for reconsideration and with the brief did not comply with the direction to file the data necessary to show a full year's volume, even if such evidence could be considered after the rebuttal. For these reasons, the data offered both in rebuttal and after the Final Determination was incomplete. As such, it was not persuasive proof because the evidence was not adequate to establish the Employer's actual need to fill the proposed position.

Finally, it is well settled that certification may be denied when an employer fails to provide documentation that the CO reasonably requested. **Dr. and Mrs. Bernard Greenbaum**, 95 INA 142 (Mar. 27, 1997); **Dr. Daryao S. Khatri**, 94 INA 016 (Mar. 31, 1995). There is no evidence of record that suggests that the evidence Employer failed to file in the rebuttal was unavailable or impossible to acquire, or that it was, in fact, provided in some satisfactory form.

For these reasons, after examining the application, NOF, rebuttal, Final Determination and the appeal, the Panel agrees that the evidence of record supported the CO's finding that the Employer failed to sustain its burden of proving that the position it offered was a *bona fide* job opportunity to which U. S. workers could be referred. **H. C. LaMarche Enterprises**, 87 INA 607 (Oct. 27, 1988).[8] Accordingly, the following order will enter.

---

[7] To the extent that the evidence Employer has belatedly offered contains material facts that were not in the record before the CO, such new evidence may not be considered by the panel.20 CFR § 656.26(b)(4). And see **Modular Container Systems, Inc.**, 89 INA 228 (Jul. 16, 1991)(*en banc*); **Yaron Development Co.**, 89 INA 178 (Apr. 19, 1991)(*en banc*).

[8] Although the words "*bona fide* job opportunity" do not appear in the regulations, 20 CFR § 656.20(c)(8) was interpreted as follows by the U. S. District Court in **Pasadena Typewriter and Adding Machine Co., Inc., and Alirez Rahmaty v. United States Department of Labor**, No. CV 83-5516-AABT, (C.D. Cal., 1987), "The regulations require a 'job opportunity' to be 'clearly open.' Requiring the job opportunity to be *bona fide* adds no substance to the regulations but simply clarifies that the job must truly exist and not merely exist on paper."

ORDER

The Certifying Officer's denial of labor certification is hereby Affirmed.

For the panel:

FREDERICK D. NEUSNER
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W.
Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.